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Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners*
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.

VALERIA TANCO, ET AL., PETITIONERS
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.

APRIL DEBOER, ET AL., PETITIONERS
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.

GREGORY BOURKE, ET AL., PETITIONERS
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY ET AL.

On Writs of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF *AMICI CURIAE* 100 SCHOLARS OF MARRIAGE IN SUPPORT OF RESPONDENTS

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave.
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

HUDSON PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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I. The man-woman understanding of marriage confers enormous benefits on society, especially children of opposite-sex couples. 4

II. Removing the man-woman definition of marriage creates enormous risks to society, especially to children of opposite-sex couples. 13

A. These risks are amply established by settled theoretical evidence. 14

B. Ample empirical evidence supports the conclusion that removing the man-woman definition would create substantial risks to children and, hence, to society. 18

III. Judicial responses to the institutional defense have been deeply flawed. 26

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INTRODUCTION AND INTERESTS OF *AMICI* [1]

In our brief supporting review, we highlighted the concerns previously expressed by Justices Kennedy and Alito about the potential harm to children of opposite-sex couples if states were forced to abandon the traditional man-woman definition of marriage. For example, during argument in *Hollingsworth*, Justice Kennedy noted that, in its potential impact on children and society, imposing same-sex marriage could be akin to jumping off a cliff—thus subjecting society to whatever unseen dangers might lurk at the bottom. Oral Argument at 47:19-24. Justice Alito echoed that concern in *United States v. Windsor*, citing it as an important reason why evaluating the potential impact of a forced redefinition of marriage calls for "[judicial] caution and humility." 133 S.Ct. 2675, 2715-16 (2013) (Alito, J. dissenting).

Our earlier brief also explained, to a lesser degree, *why* Justices Kennedy and Alito were right to be concerned about the harm from a forced redefinition—especially to the children of opposite-sex couples—and why federal appellate judges in the Fourth, Seventh, Ninth and Tenth Circuits were wrong to dismiss those concerns as "irrational." See Brief of 76 Scholars of Marriage at 3-23. Remarkably, petitioners and their *amici*—including the Department of Justice—continue to ignore or dismiss those concerns. See, *e.g.*, Obergefell Brief 55-57; DeBoer Brief 36; Bourke Brief 47-50. Like those Circuits, petitioners

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[1] This brief is filed with the consent of all parties. *Amici* and undersigned counsel have authored this brief in whole, and no other person or entity has funded its preparation or submission.

and their *amici* have thus adopted—with no meaningful analysis—the misleading motto of same-sex marriage advocates that "my marriage won't harm your marriage."

But the concerns expressed by Justices Kennedy and Alito remain well founded: Any ruling compelling states to redefine marriage in genderless terms will adversely alter the whole institution of marriage. That is not because same-sex *marriages* will directly "harm" existing man-woman marriages. It is because the forced *redefinition* will undermine important social norms—like the value of biological connections between parents and children—that arise from the man-woman understanding; that typically guide the procreative and parenting behavior of *heterosexuals*; and that are highly beneficial to their children. Accordingly, a decision imposing same-sex marriage on the states will likely bring—or at least create an enormous risk of—substantial long-term harm, especially to the children of man-woman unions.

Taken together, these points constitute what we call the "institutional defense" of man-woman marriage laws. That defense does not depend on particular views about sexual morality, theology or natural law. *Amici*, who are scholars of marriage and the family from various disciplines—including sociology, psychology, economics, history, philosophy, literature, political science, pediatrics and family law—hold various views on those matters. But we are united in our conviction that forcing a state to redefine marriage in genderless terms will seriously disserve the vast majority of the state's children and, hence, its future. We therefore urge the Court to affirm the decision below.

SUMMARY

This brief articulates the institutional defense of man-woman marriage laws in more detail than our prior brief. We first discuss (Section I) the benefits of the man-woman understanding of marriage and its associated secular norms. Those norms bring enormous benefits to the children of man-woman unions—among other things by strongly encouraging a child's biological parents to remain together to raise their child.

In Section II, we describe how redefining marriage in genderless rather than gendered terms would undermine those norms and thereby create enormous social costs and risks. We also explain why, contrary to claims by *amici* Massachusetts et al., the available evidence demonstrates the seriousness of those risks. Indeed, in every U.S. jurisdiction for which such data are available, after the adoption of same-sex marriage the *opposite-sex* marriage rate declined by least five percent—in comparison to a national marriage rate that, in the past few years, has been fairly stable. And if a forced redefinition of marriage caused only a five percent permanent decline in U.S. opposite-sex marriage rates, under reasonable assumptions and over the next fertility cycle (30 years), that decline would result in nearly 1.3 million fewer women marrying. That would lead to an additional nearly 600,000 children born into nonmarital parenting situations, and nearly 900,000 more children aborted.

Section III elucidates the logical and scientific flaws in recent appellate opinions—and in the briefs of petitioners and their *amici*—that have denied or downplayed these risks. As we show, all of the re-

sponses to these points have relied upon diversion and mischaracterization rather than serious analysis.

Finally, Section IV explains—in social-science rather than legal terms—why a state's decision to retain the man-woman definition is not only rational, but narrowly tailored to compelling, secular governmental interests. The Sixth Circuit's decision should therefore be affirmed regardless of the legal standard the Court chooses.

ARGUMENT

I. The man-woman understanding of marriage confers enormous benefits on society, especially children of opposite-sex couples.

Marriage is a complex social institution that preexists the law, but is supported by it in virtually all human societies. Lévi-Strauss(a):40-41[2]; Quale:2; Reid:455; de Bracton:27; Blackstone:410; Blankenhorn(a):100. Like other social institutions, marriage is "a complex set of personal values, social norms, ... customs, and legal constraints," which together "regulate a particular intimate human relation over a life span." Allen(a):949-50; Bellah:10; North:97; Berger:52; Radcliffe-Brown:10-11.

Linking Marriage to Procreation. In virtually all societies, although sex and procreation may occur in other settings, marriage marks the boundaries of pro-

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[2] Because of the large number of studies cited, in-text citations are shortened, authors with multiple articles have letters following their last names to distinguish publications, and publications by multiple authors are identified by only the first author's last name. All sources appear in the Table of Authorities.

creation that is socially commended. Wax(b):1012; Girgis:38; Corvino:96. Thus, the most basic message conveyed by the traditional institution of marriage is that, when procreation occurs, *this* is the arrangement society prefers.

That message helps achieve a principal purpose of marriage: increasing the likelihood that any children born from sex between men and women will have a known mother and father with responsibility for caring for them. Minor:375-76; Blackstone:435; Wilson:41; Doherty(a):8-9; Brief of Scholars Robert George et al. That is one reason why, even in ancient Greek and Roman societies, which encouraged same-sex intimate relations, marriage was limited to man-woman unions. Patterson:16-17,23-27; Oxford:902; Wardle(a):784-85.

Thus, although marriage secondarily benefits its adult participants, it is "*designed* around procreation." Allen(a):954. As famed anthropologist Bronislaw Malinowski emphasized, "the institution of marriage is primarily determined by the needs of the offspring, by the dependence of the children upon their parents." Malinowski:11. Indeed, as observed by Bertrand Russell (no friend of Judeo-Christian theology or sexual mores), "[b]ut for children, there would be no need of any institution concerned with sex." Russell:77, 156; *accord* Llewellyn:1284.

The man-woman understanding and definition are thus integral not only to the social institution of marriage that state marriage laws are intended to support, but also to the states' purposes in providing that support. Story:168; Kent:76; Bouvier:113-14; Bishop: §225. That is one reason why, until recently, states

had uniformly rejected what Justice Alito has aptly called the adult-centric, "consent-based" view of marriage—focused principally on adult relationships—and had embraced instead the "conjugal" view, based primarily on the procreative potential of most man-woman unions. *Windsor*, 133 S.Ct. at 2718; IAV(a):7-8; Stewart(a):337; Yenor:253-73. Even today, excluding judicially-imposed definitions, most states have implemented the conjugal view by retaining the man-woman definition—despite decisions by some states to redefine marriage in genderless terms, i.e., as the union of any two otherwise qualified "persons."[3]

By itself, the man-woman definition reinforces that marriage is centered primarily on procreation and children, which man-woman couples are uniquely capable of producing naturally. Davis:7-8; Wilson:23; Blackstone:422; Locke:§§78-79; Anthropological Institute:71; Wilcox(b):18-19; Girgis:38; Wax(b):1000. That definition also conveys that one purpose of marriage is to provide for children that may be created unintentionally—an issue also unique to man-woman couples. IAV(b):6. Most obviously, by requiring a man and a woman, that definition communicates that this structure is expected to have both a "masculine" and a "feminine" aspect—with men and women complementing each other. Nock:*passim*; Levi-Strauss(b):5; Scholars of History Brief:I.A-B.

Specific Marital Norms. By implicitly referencing children, unintentional procreation, masculinity and femininity, the man-woman definition not only rein-

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[3] *E.g.*, *Marriage Equality Act* (NY), AB A08354 (June 24, 2011); *Civil Marriage Protection Act* (MD), House Bill 438 (March 1, 2012).

forces that society prefers that procreation occur within marriage–it also "teaches" or reinforces certain procreation and child-related "norms," *Windsor*, 133 S.Ct. at 2718, that are necessarily directed at heterosexuals:

1. Where possible, every child has a right to be reared by and to bond with her biological father and mother (the "biological bonding" norm). *Convention on the Rights of the Child*, 1577 U.N.T.S. 3, 47; Somerville(a):179-201; Aristotle:§12; Locke:§78; Velleman:370-71; Young(b):154-55; Browning:45; Organizations Supporting Biological Parenting Brief. This norm also encompasses the more mundane but important "maintenance" norm—that every child has a right whenever possible to be supported financially by the man and woman who brought her into the world. Brinig:110-11; Minor:375-78; Young(a):9.

2. Where possible, a child should at least be raised by *a* mother and father who are committed to each other and to the child, even where he cannot be raised by both biological parents (the "gender-diversity" norm). Erickson:2-21; Esolen:29-40; Palkovitz:234-37; Witherspoon:18; Pruett(a):17-57; Pruett(b):15-34; Raeburn:121-158; Rhoads:8-45; Byrd(a):227-29; Byrd(b):382-87; Young(a):9. As a corollary, men and women who conceive together should treat marriage, and fatherhood and motherhood within marriage, as an important expression of their masculinity or femininity. Hawkins:16-20; Nock:58-59; Erickson:15-18; Brief of Organizations and Scholars of Gender Diverse Parenting.

3. Men and women should postpone procreation until they are in a committed, long-term relationship (the "postponement" norm). Dwyer:44-76; Grossman(a):10; McClain:2133-84; Friedman:9-10; Schneider:495-532; Young(a):9. This is sometimes called the "responsible creation" or "channeling" norm. Schneider:498.

4. Undertaken in that setting, creation and rearing of children are socially valuable (the "procreation/child-rearing norm"). Young(b):161-63; Wardle(a):784-86; Girgis:44; see Scholars of Fertility Brief.

5. Men and women should limit themselves to a single procreative partner (the "exclusivity norm"). Wilson:32-38; Blankenhorn(a):148-50; Plato:1086.

All these norms are grounded in the more general norm that, in all their decisions, parents and prospective parents should give the interests of their children—present and future—equal if not higher priority to their own (the "child-centricity" norm). IAV(b):6.

How These Norms Benefit Children and Society. States and their citizens—especially children—benefit enormously when man-woman couples heed these norms, which are central to the conjugal vision of marriage. Common sense and much social-science data teach that children do best emotionally, socially, intellectually and economically when reared in an intact home by both *biological* parents. Wilcox(b):11; Moore; McLanahan(a):1; Lansford:842; Organizations Supporting Biological Parenting Brief:21-24.

A couple's shared biological tie to their child deepens their investments in their relationships with each other as well as their child. Rosenberg:11. For example, a man's biological connection to his child not only directly strengthens his bond with that child, it also indirectly strengthens his bond with the child's mother, thereby encouraging male protection and investment in both relationships. *Id.* That three-way bond is uniquely valuable because of its time-tested tensile strength. Other families might function well and achieve stability, but co-biological families are most *likely* to function best.

Moreover, compared with children of man-woman couples raised in any other environment, children raised by their two biological parents in a married family are *less* likely to commit crimes, experience teen pregnancy, have multiple abortions, engage in substance abuse, suffer from mental illness or do poorly in school, and *more* likely to support themselves and their own children successfully in the future.[4] Accordingly, such children need less state assistance and contribute more to the state's economy and tax base. Amato(b). Indeed, the evidence overwhelmingly establishes that no other parenting arrangement comes close (on average) to that of the child's biological mother and father. Wilcox(b):11; Moore; McLanahan(a):1; Lansford:842.

That is true, not only because of the power of biological kinship, but also because of the value of gen-

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[4] Jeynes:85-97; Marquardt(a); Amato(c):26-46; Amato(a):543-56; Wallerstein(a):444-58; Wallerstein(b):545-53; Wallerstein(c):65-77; Wallerstein(d):199-211; Wallerstein(e); Wallerstein(f):593-604; Marquardt(b):5; Wax(a):579-80; Fagan:1-2.

der diversity—having both a mom and a dad. Grossman(b):325; Erickson:*passim*; Popenoe:146; Witherspoon:18; Glenn:27; Lamb:246; Byrd(a); Byrd(b):382-87; Pakaluk:4; Hofferth(b):81; Denham:23-45; Maccoby:272; Parke:7; Coltrane:54; Lewis:213; Powers:980-89; *U.S. v. Virginia*, 518 U.S. 515, 533 (1996); Brief of Organizations and Scholars of Gender Diverse Parenting. For example, one scholar offered the following compelling explanation of the unique importance of fathers to the healthy sexual and social development of their sons:

> What a boy gets from experiencing the dependable love of a father is a deep personal experience of masculinity that is pro-social, pro-woman, pro-child...Without this personal experience of maleness, a boy (who ... is deeply driven to seek some meaning for masculinity) is vulnerable to a variety of peer and market-driven alternative definitions of masculinity, often grounded in...aggression, physical strength, and sexual proclivities... The importance of a father in giving a boy a deeply pro-social sense of his own masculinity may be one reason why one large national study found that boys raised outside of intact marriages were two to three times more likely to commit a crime leading to imprisonment. Erickson:20 (quoting Gallagher(a):210-11)).

The same scholar offered a similarly compelling account of the unique importance of fathers to the sexual development of their daughters:

> [A] girl raised without a father does not come to adolescence with the same deep experience of what male love feels like when it is truly protec-

> tive, not driven primarily by a desire for sexual gratification. ... [F]atherless girls may experience a hunger for masculine love and attention that leaves [them] particularly vulnerable to use and abuse by young adult males. Girls raised without fathers are at high risk for unwed motherhood. *Id.*

In short, as famed anthropologist (and atheist) Margaret Mead noted, "[o]ne of the most important learnings for every human child is how to be a full member of its own sex and at the same time fully relate to the opposite sex. This is not an easy learning; it requires the continuing presence of a father and a mother ...." Mead:359.

Besides ensuring that their children have both a father and a mother, opposite-sex parents who embrace the norms of child-centricity and maintenance are also less likely to engage in behaviors—such as physical or sexual child abuse, neglect or divorce—that not only harm their children, but typically require state assistance or intervention. Popenoe; Blankenhorn(b); Manning; Flouri:63. People who embrace the procreative exclusivity norm are likewise less likely to have children with multiple partners—a phenomenon that leads to social, emotional and financial difficulties for children. Cherlin(a):137; Wilson:32-38; Wax(b):1006-07, 1012; Blankenhorn(a): 148-50; Plato:1086. And people who embrace the postponement norm are less likely to have children without a second, committed parent—another well-established predictor of psychological, emotional and financial trouble. Oman:757; Bonell:502; Kantojarvi:205; Bachman:153.

By contrast, people who do not appreciate the social value of creating and rearing children are less likely to do so. And that view, if sufficiently widespread, would jeopardize society's ability to reproduce itself—at least at levels sufficient to maintain intergenerational welfare programs. Wardle(a):782,87-89; O'Brien:31-32,38-41; see Scholars of Fertility Brief. That is also why Judge Perez-Gimenez was correct in concluding that "[t]raditional marriage"—man-woman marriage—"is the fundamental unit of the political order. And ultimately the very survival of the political order depends upon the procreative potential embodied in traditional marriage." Conde-*Vidal v. Garcia-Padilla*, No. 14-1254 (PG) (Oct. 21, 2014), slip op. at 20.

For all these reasons, the Sixth Circuit was also correct in concluding that citizens "may well need the government's encouragement to create and maintain stable relationships within which children may flourish," and that the man-woman definition of marriage provides that encouragement. *DeBoer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014). Moreover, although these points were brought to the Court's attention at the petition stage, see Marriage Scholars Brief at 3-8, petitioners and their allies have not disputed them. That silence speaks volumes.

II. Removing the man-woman definition of marriage creates enormous risks to society, especially to children of opposite-sex couples.

Given the social significance of man-woman marriage, it's not surprising that so many informed commentators on both sides have predicted that redefining marriage to accommodate same-sex couples—which requires removing the man-woman understanding and the associated definition—will change the institution profoundly.[5] The law can alter institutions and hence change social norms. Harrison:xxviii. Thus, as Oxford's prominent legal philosopher Joseph Raz observed, "the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from ... arranged to unarranged marriage." Raz(b):23.

But whereas the change to unarranged marriage probably benefited the children of heterosexuals, a forced redefinition of marriage in genderless terms subjects them to enormous risks—as explained in our prior brief and in more detail below. And here again, despite ample opportunity, petitioners and their *amici* have failed to dispute the theoretical or empirical evidence establishing the risks of a forced redefinition.

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[5] Bix:112-13; Dalrymple:1,24; Blankenhorn(a):157; Stoddard:19; Cere:11-13; Farrow(a):1-5; McWhorter:125; Stacey:126-28; Young(c):48-56; Bolt:114; Carbado:95-96; Gallagher(b):53; Hunter:12-19; Sullivan:1-16; Widiss:778,781; Raz(a):161; Stewart(b):10-11; Searle:89-122; Reece:185; Stewart(c); Clayton:22; Stewart(d):503; Stewart(e):239-40; Bradley:193-96; Young(b):156-65; Eskridge(a):11.

A. These risks are amply established by settled theoretical evidence.

Erosion of Marital Norms. For man-woman couples, removing the procreation-focused, man-woman definition will erode the message that society prefers that procreation occur within marriage, as well each of the specific norms that depend upon or are reinforced by that definition. IAV(b):18; Allen(b):1043. For example, as Professors Hawkins and Carroll have explained, such a redefinition undermines the gender-diversity norm by creating a structure in which two women (or two men) can easily raise children together as a married couple. That structure thus gives the law's authoritative approval to an arrangement that systematically excludes fathers (or mothers) from a role as primary care-givers to their biological children. Hawkins:13-16; Carroll:59-63. It thereby weakens the bonding or biological connection norm inherent in the man-woman definition. See Organizations Supporting Biological Parenting Brief:24-31.

Such legal changes are especially likely to undermine those norms among heterosexual men, who generally need more encouragement to marry than women. Wax(c):60; Doherty(b):278. Such changes convey that society no longer needs men to bond to women to form well-functioning families or to raise happy, well-adjusted children. Hawkins:14-16; Nock:58-59; Young(c):50-51; Young(b):158-59.

For similar reasons, a redefinition would weaken the expectation that biological parents should take financial responsibility for children they create. It would also weaken the expectation that parents will

put their children's interests ahead of their own. Hawkins:20.

Equally important, and for similar reasons, removing the gendered definition would teach that society now considers the natural family (a woman, a man, and their biological children), and the capacity of a woman and a man to create human life, of no special value. Knapp:626-28. That would inevitably undermine the procreativity/child-rearing norm, the exclusivity norm, and the postponement norm.

Our prediction that redefining marriage would undermine all of these norms—and the overarching preference that procreation occur within marriage—is consistent with the view expressed by same-sex marriage advocates like William Eskridge, who conceded that "enlarging the concept to embrace same-sex couples would necessarily transform [the institution of marriage] into something new." Eskridge(b):19. Indeed, another same-sex marriage advocate, E.J. Graff, exulted that "[s]ame-sex marriage is a breathtakingly subversive idea...[If it ever] becomes legal, [the] venerable institution [of marriage] will ever stand for sexual choice, cutting the link between sex and diapers," Graff:12—that is, children.

Finally, our prediction of the negative effects of a redefinition accords with the view oft expressed by judges and scholars that the law can play a powerful "teaching" function. Hawkins:20; Sunstein(a):2027-28; Posner; Cooter; Lessig:2186-87; Sunstein(b); Nee:19. One example is Justice Kennedy's observation of the power of disability laws to "teach" society the norm of treating persons with disabilities as full-fledged citizens. *University of Alabama v. Garrett*,

531 U.S. 356, 375 (2001) (Kennedy, J., concurring). That same teaching principle applies to laws defining and regulating marriage, which likewise either reinforce or undermine the norms long associated with it.

Resulting Harms to Children and Society. Just as these norms benefit the state, society and children, their removal or weakening would harm the interests of the state and its citizens. For example, as fewer man-woman couples choose to limit procreation to marriage relationships, and as fewer embrace the norms of biological connection, gender diversity, maintenance and postponement, a higher percentage of children would be raised without both a mother and a father—usually a father. Hawkins:18-20; Biological Parenting Brief:24-31. That would mean a higher percentage being raised in poverty; experiencing psychological or emotional problems; experiencing teenage pregnancy; doing poorly in school; engaging in substance abuse and committing crimes—all at significant cost to the state.[6] It would also mean a higher percentage of girls who later undergo multiple abortions. Fagan:1-2.

Similarly, as fewer parents embraced the norm of child-centricity, more would make choices driven by personal interests rather than the interests of their children. Wax(b):1012. Many such choices would likewise impose substantial costs on the state. Wildsmith:5; Scafidi:9; Kohm:88. Moreover, by breaking the procreation-parenting link, a redefini-

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[6] Popenoe:*passim*; Blankenhorn(b):*passim*; Manning:*passim*; Flouri:63; Ellis:*passim*; Bowling:13; Marquardt(b):5; Wu:*passim*; Wardle(b):*passim*; Harper:384-86; Young(c):49,52-56; Wax(a): 579-80.

tion would require additional changes to the legal and social institution of parenting—creating another major source of societal risk. Farrow(b); Morse(a); Morse(b).

Because a redefinition also jeopardizes aggregate fertility—by weakening the social norms favoring reproduction and marriage—such a redefinition would pose even greater long-term risks to society. Zhang; Brown(a); Martin:Table12; Wardle(a):784-86. As Professor Allen has noted, "[p]oorly designed laws"—including laws that undermine long-standing social norms—can "lead to... unsuccessful marriages, which in turn lead to low fertility... and ultimately a decline in the society." Allen(a):956. And even a modest decline in fertility can threaten the viability of intergenerational social welfare programs. See, *e.g.*, Vos:485; Scholars of Fertility Brief.

That isn't to suggest a redefinition would affect all social groups identically. People who are more religious, for example, generally have reasons—beyond the "teaching" power of the law—for embracing both the man-woman understanding of marriage and associated social norms. Similarly, regardless of religion, people who are well-educated and wealthy tend to embrace the expectations and norms associated with traditional marriage more than the poor or uneducated. Wilcox(a):53; Cahn:3,18-19,166; Murray:149,151-57,163-67; Cherlin(b); Wax(a):570-71. Accordingly, we would expect to see the social costs of redefining marriage concentrated among the relatively non-religious and less well-to-do. See Scholars of the Welfare of Women Brief. As Professor Amy Wax has noted, "[m]arriage's long track record as a building block for families and a foundation for beneficial relations

between the sexes suggests that ordinary people desperately need the anchor of clear expectations, and that they respond to them." Wax(b):1012.

In short, as petitioners and their *amici* concede by their silence, the institution of marriage is like a valuable hanging tapestry, with the man-woman definition a critical thread running through it: Remove that thread and, over time, the tapestry unravels. Schneider:498; Allen(a):963-65; Stewart(a):327-28. That would be a tragedy for society and, especially, its children.

B. Ample empirical evidence supports the conclusion that removing the man-woman definition would create substantial risks to children and, hence, to society.

What does the available empirical evidence tell us about these risks? Several pro-redefinition commentators have cited Massachusetts—which adopted genderless marriage a decade ago—in claiming that such a change has no adverse effects. *E.g.*, Brief of Massachusetts et al., at 20-24. In fact, the most recent evidence shows an overall *increase* in divorce in the wake of Massachusetts' decision, and an overall *decrease* in marriage rates among opposite-sex couples there. See Appendix B. The same is true of the other states—and nations—that have adopted same-sex marriage and for which we have data. *Id.* Moreover, studies relying upon larger sample sizes and more sophisticated statistical analysis strongly suggest that a redefinition would have substantial adverse effects—or at least presents a serious risk of such effects.

Requirements for Statistical Validity. Obviously, one cannot fairly infer that a decision to redefine marriage *caused* (or did not cause) an increase in divorce or a reduction in marriage without controlling for confounding factors. But no studies based on U.S. data have attempted to do so, including a recent study by Marcus Dillender purporting to find "no evidence" that allowing same-sex marriage has any effect on U.S. opposite-sex marriage or divorce rates. Dillender:582. That study has a number of fatal methodological flaws.

One is its assumption that the full impact of redefining marriage would show up in statistically meaningful ways shortly after redefinition. As Justice Alito's remarks in *Windsor* suggest, that assumption is unrealistic for an ancient and complex social institution like marriage. *Windsor*, 133 S.Ct. at 2715-16. Marriage experts have frequently and correctly noted that major social changes operate with a "cultural lag" that often requires years—sometimes a generation or two—to be fully realized. Cherlin(a):142-43.

Another flaw is the study's failure to examine impacts on groups that might be affected *differentially* by the redefinition—for example, the relatively less religious, educated or prosperous. The religious or wealthy could well embrace the norms associated with man-woman marriage with greater determination during and just after a state's decision to redefine marriage. And that effect could mask a negative impact on less religious or prosperous segments. Yet

Dillender confesses he cannot test these possibilities in his data. Dillender:568.[7]

The Netherlands Study. The only credible study of which we are aware that adjusted for this problem is a recent study of the Netherlands, which formally adopted genderless marriage in 2001 but had adopted same-sex civil unions in 1998. That study, by Mircea Trandafir, shows a clear post-redefinition *decline* in marriage rates among man-woman couples in urban areas—compared to the Netherlands' rural Bible Belt. Trandafir(a):336. After adjusting for confounding factors, the nationwide net decline in marriage rates for women ages 18-22 was 5.0%. *Id.* 333. Young women in the top four urban areas, as well as native Dutch women nationwide, saw even larger declines. *Id.* 336-337. This study also suggests the debate surrounding genderless marriage caused a (likely) temporary increase in marriage rates among the more religious—which embraced traditional marriage with greater fervor—and which tended to offset *temporarily* the decrease in man-woman marriages among the more urban, less religious segments. *Id.* 334-336.

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[7] A similar 2009 study concluded that the "argument that same-sex marriage poses a negative externality on society cannot be rationally held." Langbein:292. However, a recent attempt to replicate that study found that some variables had been coded incorrectly, that the results were often not robust to alternative estimation methods, and that the paper's empirical strategy is incapable of testing what the study's authors claim they are testing. Allen(d):1. When many of these errors are corrected, the study's findings disappear into the statistical haze of insufficient power—meaning nothing can be inferred from it.

It was only by examining these populations separately that Trandafir discovered this differential effect. His study thus shows that, though the more religious segments of Dutch society may not have seen a short-term reduction in man-woman marriages, other segments—those lacking a strong alternative source for marital norms—saw a reduction in opposite-sex marriage rates.[8] For those segments, that reduction will also impair the many social benefits—beginning with lower rates of fatherlessness—that man-woman marriage has long produced.

U.S. State Statistics. Contrary to the assertions of *amici* Massachusetts et al., experience in U.S. states that have adopted same-sex marriage likewise point to a substantial risk of reduced man-woman marriage rates, increased fatherlessness and associated ills. As explained in Appendix B, *every* state that has adopted same-sex marriage and kept the relevant data has in a short period seen a substantial decline in the rate of opposite-sex marriages—ranging from 5.1 percent to nearly 9 percent. Conversely, from 2009 (the year Iowa and Connecticut implemented same-sex marriage, and the first full year of same-sex marriage in Connecticut) to 2012, the overall U.S. marriage rate stayed the same. CDC(b).

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[8] More recently, Trandafir published a comment on his Netherlands study (Trandafir(b)), and a study of the effects of same-sex marriage in other OECD countries. Trandafir(c). The comment adds no new data, nor new analysis of his previous data. And surprisingly, unlike his Netherlands study, the more recent study (also addressed in Appendix B) does not attempt to examine the impact of marriage redefinition on various population segments.

Under reasonable assumptions, moreover, a five percent reduction in the U.S. long-run opposite-sex marriage rate, with half of that reduction being marriage forgone rather than marriage delayed, would likely result in an additional 1.275 million women eschewing marriage over the next fertility cycle (30 years). See Appendix B. The mechanism is simple and intuitive: Fewer opposite-sex marriages means more unmarried women, more children born to unmarried mothers, fewer total children born, and more children aborted.

Specifically, under conservative assumptions, a mere five percent reduction in opposite-sex marriage rates would result in nearly 600,000 more children being born to unmarried women. See Appendix B. That would lead to increases in the percentage of children living in poverty, experiencing psychological or emotional problems, suffering from teenage pregnancy, doing poorly in school, engaging in substance abuse, committing crimes, and obtaining abortions—all with adverse impacts on society. See *supra* at IIA. Additionally, again under conservative assumptions and over the next 30 years, this would lead not only to hundreds of thousands fewer births, but also to nearly 900,000 more abortions. See Appendix B.

Studies of the Value of Dual-Biological Parenting. The Dillender study also ignores that a redefinition would likely result in fewer children being raised by their biological parents for reasons *other* than reduced marriage rates. For example, by weakening the biological bonding and gender-diversity norms associated with traditional marriage, over time a redefinition would likely lead more married parents either to divorce—as appears to have happened in

Massachusetts and other same-sex marriage states—or to separate from their spouses and raise their children in new arrangements without going through the formality of a divorce. Similarly, by weakening the exclusivity norm, a redefinition would likely lead more people to engage in "serial polygamy"—having children with multiple partners, with or without the formalities of marriage and divorce. Krause:103; Lorio:1177-78. Both of these effects would lead to more children of man-woman couples being raised outside the presence of one or both biological parents.

The empirical evidence further indicates that, in the aggregate, such an outcome would be very bad for children. *All* of the large-sample studies show that children raised by their two biological parents in intact marriages do better, on average, than children raised in any other parenting arrangement, including step-parenting, single parenting, mother-grandmother parenting, and adoption—as valuable and important as those fallback arrangements are. Significant differences appear across a wide range of outcomes, including freedom from serious emotional and psychological problems, Sullins(a):11, Sullins(b):996, McLanahan(b):399, Culpin:2615, Kantojarvi:205; Hofferth(a):53; avoidance of substance abuse, Brown(b):259; avoidance of behavioral problems generally, Osborne:1065, Cavanagh:551; and success in school, McLanahan(b):399, Bulanda:593; Gillette:309; Allen(a):955. Indeed, the stark differences between children raised by their two biological parents and children raised by a biological parent and a heterosexual step-parent demonstrate that there is no substitute for biological connections between the child and *both* of her parents. McLana-

han(a):1; Brown(b):259; Turner:39; Daly:197; Lenciauskiene:607; Case:301.

In short, given that the vast majority of parents are heterosexuals, Miller:16, any policy that leads to a larger percentage of *their* children being raised outside an intact marriage of two biological parents would be catastrophic for children generally, and for society. That is why removing the man-woman definition is so dangerous.

No-Fault Divorce. These risks are reinforced by the history of no-fault divorce. Allen(a):965-66; Hawkins:6-12; Alvare:137-53. Before the no-fault divorce movement, marriage strongly conveyed an additional norm beyond those discussed above—a norm of permanence. Parkman:91-150. When no-fault divorce was first proposed, its advocates argued it wouldn't undermine that norm: Only those whose marriages were irretrievably broken would use the new, streamlined (and less contentious) divorce procedures. Wallerstein(g); Stevenson:267. Those in happy marriages—and hence the institution of marriage itself—would not be adversely affected. Hawkins:7-11; Allen(a):966-67; Whitehead:81-90.

Such predictions proved overly optimistic. By permitting unilateral divorce for any or no reason, no-fault divorce soon undermined the norms of permanence and child-centricity, leading directly to a divorce explosion. Parkman:93-99; Allen(a):967-69; Spaht:1547; Glendon:108; Goode:144. That led to a host of problems for the affected children—financial, academic, emotional and psychological. Allen(a):969.

Most states, moreover, adopted no-fault divorce without first observing its effects elsewhere for a sustained period. Wardle(c). And, although some scholars have argued divorce has been stable or declining, new research shows this is true *only* among 20-35-year olds—because of increased selectivity in entering marriage—and that among those over 35, divorce rates have substantially increased. Kennedy:587. That reality signals an apparently permanent, adverse change in the marriage institution. Parkman:91. Especially in light of that experience, many states are understandably reluctant to adopt another change—genderless marriage—that seems likely to undermine not just one marital norm, but several.

In short, the available evidence reinforces Justices Kennedy's and Alito's fear that, in its effects on children, a forced redefinition of marriage may be akin to jumping off a cliff. Although it is impossible to see with *complete* clarity all the dangers at the bottom, we know enough to confidently predict the landing will not be soft. And here again, despite ample opportunity, petitioners and their *amici* have failed to refute the analysis underlying this conclusion.

III. Judicial responses to the institutional defense have been deeply flawed.

Some of these points have been addressed obliquely by the circuit judges invalidating state marriage laws. But their opinions ignore the principal point: Like no-fault divorce, redefining marriage in genderless terms will change the *institution* of marriage in ways that adversely affect the behavior of *heterosexuals*— Giddens:98. It is only by ignoring a redefinition's impact on the institution that courts can claim—as some have—that the man-woman definition does not advance the state interests described above. *E.g., Bostic v. Schaefer*, 760 F.3d 352, 382-83 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014).

Parenting by Gays and Lesbians. Rather than address the institutional defense head-on, most judges have offered diversions, beginning with the suggestion that it casts aspersions on gays and lesbians—including their fitness as parents. *E.g., Latta v. Otter*, 771 F.3d 456, 473-74 (9th Cir. 2014), *cert. pending* (No. 14-765). But the institutional defense neither depends upon nor advocates any view about the impact of sexual orientation on parenting. To be sure, there is a lively academic debate on the differences in outcomes for children raised by opposite-sex versus same-sex couples[9]—rebutting petitioners'

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[9] See American College of Pediatricians Brief; Sullins(a); Sullins(b); Regnerus(a):752-770; Regnerus(b):1367; Allen(c):30; Schumm(a):79-120; Schumm(b):329-40; Schumm(c):2165; Marks:735-51; Allen(a):955-61; Sarantakos:23-31; Lerner; *compare* Golombok:20; Wainright:1886; Biblarz:3. The effect of parental sexual orientation is distinct from the effect of parental gender diversity. *See* Brief of Organizations and Scholars of Gender Diverse Parenting.

claim that there is "scientific consensus" on that issue. Bourke Brief at 51. But the institutional defense focuses on something different: the impact of removing the man-woman definition on the marriage institution—i.e., marriage's public meaning—and the resulting impact on children of *heterosexuals*.

This misunderstanding of the institutional defense is evident in Judge Reinhardt's reaction to the point that "[b]ecause opposite-sex couples can accidentally conceive ... marriage is important because it serves to bind such couples together and to their children." *Latta*, 771 F.3d at 471. After acknowledging that this "makes some sense," Reinhardt still rejects the institutional defense because (he says) it "suggests that marriage's stabilizing and unifying force is unnecessary for same-sex couples ..." *Id.* But that's not the point. Even if same-sex couples and their children would benefit from an "any two persons" redefinition—a point on which the evidence is inconclusive (see American College of Pediatricians Brief)—no state can responsibly ignore the impact on the far larger population of man-woman couples and their children. Regardless of the definition of marriage, *those* children will constitute the vast majority in the foreseeable future. Allen(c):635-58; Miller.

Indeed, for every child in the United States currently raised by at least one gay or lesbian parent (240,000 overall, or 1/3 of one percent), there are 307 who are not (73,577,000). Miller; Vespa:Table 10. For that reason, no state can responsibly ignore the impact of removing the man-woman definition on the institution of marriage. Schumm(d).

Other diversions. Another diversion is Judge Lucero's argument that "it is wholly illogical to believe that state *recognition* of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014). This ignores that legally recognizing genderless marriage requires more than "recognition" of same-sex couples' love and commitment. Same-sex marriage requires a *redefinition* of the marital relationship that eliminates its gender-complementary character—replacing "man" and "woman" with "persons." *See supra* note 3. But this establishes (among other things) that children have no right to be reared by both a mother and a father, much less their biological parents. Somerville(b).

For these reasons, a belief that removing the gendered aspect of marriage will harm the institution is more than "logical." Indeed, it would be *illogical* to believe that a major social institution can be redefined without *any* collateral damage to the institution or to those who benefit from it—especially children.

In a similar diversion, Judge Reinhardt claims that the institutional defense assumes that "allowing same-sex *marriages* will adversely affect opposite-sex marriage ...." *Latta*, 771 F.3d at 469. But it's not the existence or even "recognition" of same-sex marriages that is of principal concern. Again, it's the *redefinition* that such marriages require—replacing the man-woman definition with "any qualified persons"—and the resulting impact of that redefinition on the *institution* of marriage, as perceived and understood, over a long period, in our social norms and values. As ex-

plained, a large body of social science research affirms that, especially at the margins, such a radical institutional change can and likely *will*, in Judge Lucero's words, "affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 755 F.3d at 1223.

Equally misguided is Judge Reinhardt's dismissal of the idea that "a father will see a child being raised by two women and deduce that because the state has said it is unnecessary for that child ... to have a father, it is also unnecessary for *his* child to have a father." *Latta*, 771 F.3d at 470. But it's not a father's "*see*[ing] a child being raised by two [married] women" that will reduce heterosexual males' enthusiasm for marriage. It's the fact that, before they become fathers, marriage will have *already* been redefined in a way that signals their involvement is less important. Hawkins:12-20; Young(b):159. Although not all heterosexual fathers or potential fathers will have less interest in marriage, *some*—especially those at the margins—undoubtedly will. *Id.*; Wax(c):57.

Similarly, when Judge Posner quips that heterosexuals are "rewarded" with marriage because they produce unwanted children while same-sex couples who cannot produce unwanted children are "denied the right to marry," he misses a fundamental fact. *Bostic* at 662. Marriage laws, and the gender-complementary social institution they reinforce, have nothing to do with gays and lesbians, either in design or purpose. Gender-complementary marriage sprang up in human history and has been reinforced by governments to address the unique characteristics, bene-

fits, and problems of man-woman sexual unions. See *supra* 4-6; Scholars of History Brief.

Judge Reinhardt is likewise off the mark when, referencing Judge Posner's opinion, he sarcastically wonders how genderless marriage would "drive opposite-sex couples to sex, drugs, and rock-and-roll." *Latta*, 771 F.3d at 471 fn12. States are not generally worried about rock-and-roll. But it is not implausible that a movement away from the child-centric norms of traditional marriage would weaken marriage's role in encouraging parents to avoid self-seeking activities like drug use and extra-marital sex, which will likely harm their children. One can laugh away the norms of marriage, but undermining that ancient, beneficent institution is no laughing matter.

Failure to Consider the Marginal Case. The most basic flaw in the analyses of Judges Reinhardt, Lucero and Posner is the classic failure to consider the "marginal" case. Making marriage genderless may have little impact on those who are now married or who are well educated, well-to-do, religious and/or otherwise committed to the marital norm of sexual intercourse only between husband and wife. But *marginal* marriage candidates—including the poor, relatively uneducated, irreligious or others who are highly influenced by cultural messages promoting casual and uncommitted sex—likely will be affected. Wax(c):60-61,71. And then the margins will likely expand, as they did with no-fault divorce. *Id.*:65

Indeed, when no-fault divorce was introduced, almost no one thought some other couple's ability to more easily divorce would affect their own marriage. And no one thought no-fault divorce would reduce

marriage rates. Jacob:151-52; Parkman:3; Weitzman:xi; Jennings:71 Now it is clear that no-fault divorce *has* fundamentally altered the marriage institution—for many, making it more adult-centric—and in the process *has* reduced marriage rates. It started at the margins, but the divorce culture has now penetrated our marriage institution almost to the core. See, *e.g.*, Parkman:2-3,92,98-99,114,116-17,123-131; Weitzman: xi-xviii. And whatever the causal factors, one need only observe the collapse of marriage among the poor and in our inner cities to see that the institution is fragile, and its demise devastating for children. Murray:149,151-57,163-67; Wilcox(a):53.

Indeed, it does not take much unraveling at the margins of marriage to affect the nation's children substantially. As noted, a mere five percent permanent drop in the marriage rate—what young adult women in the Netherlands experienced after it adopted genderless marriage, and at the low end of the reduction experienced by U.S. states that have adopted same-sex marriage—would mean over the next 30 years, and under reasonable assumptions, nearly 600,000 more children raised outside marriage (see Appendix B), with all the negative consequences that follow. As social science has shown, the result will not be pretty.

Analysis of Empirical Studies. In response to the social risks of removing the man-woman definition (and social understanding) of marriage, Judge Reinhardt cites a study suggesting that Massachusetts' adoption of genderless marriage in 2004 had no *immediate* impact on marriage or divorce rates there. *Latta*, 771 F.3d at 469. But one decade—less than half a generation—is not enough time for the full ef-

fects of a major institutional change to be manifest. Regardless, the study's conclusions have been hotly disputed. Indeed the evidence shows that, following Massachusetts' decision, there ensued a longer-term increase in divorce and a decrease in opposite-sex marriage rates. See Appendix B; CDC(a); CDC(b).[10]

Most important, except for the Sixth Circuit, all the appellate opinions have disregarded Justice Alito's wise call for "caution and humility" in assessing the impacts of a redefinition. *Windsor*, 133 S.Ct. at 2715. He is correct that genderless marriage is still far too new—and the institution of marriage too complex—for a full assessment of those impacts. *Id.* at 2715-16. However, for reasons previously explained, the existing evidence shows that removal of the man-woman definition poses real dangers to children, to governments of all stripes, and to society. And again, despite ample opportunity, petitioners and their *amici* have not seriously disputed this.

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[10] Judge Posner also relies on the Dillender study without acknowledging its lack of statistical rigor and unrealistic assumption about the speed with which the effects of a major institutional change will be manifest. And neither he nor Reinhardt addresses the much more relevant and credible Netherlands evidence showing a clear connection between genderless marriage and decreased man-woman marriage rates.

IV. Man-woman marriage laws are neither arbitrary nor driven by animus, and satisfy any level of judicial scrutiny.

Based upon the benefits conferred on the state and its citizens by the man-woman definition and understanding of marriage, and the harms—or at least risks—to the state and its citizens of eliminating that definition, a state's decision to retain it passes any legal standard. Certainly, the analysis presented above—and the history and widespread acceptance of the man-woman limitation—forecloses the idea that such a decision is irrational or driven by animus or bigotry. Petitioners may not agree with the venerable motivations behind man-woman marriage, but that does not mean they have no basis in history, common sense, or scientific fact. To the contrary, the man-woman definition satisfies any form of heightened scrutiny because it is "narrowly tailored" to achieve "compelling governmental interests." See, *e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

1. The man-woman definition substantially advances compelling state interests—including the welfare of the vast majority of its children who are born to opposite-sex couples. Miller:16. That isn't to say that states opting to retain the man-woman definition are unconcerned with same-sex couples or the children they raise. But no state can responsibly ignore the long-term welfare of the many when asked to make a major change that might benefit at most a few—no matter how valuable and important they are.

Like many advocates of genderless marriage, the opinions by the Fourth, Seventh, Ninth and Tenth Circuits respond, not by disputing the importance of

the state's interests, but by claiming the man-woman definition pursues those interests in a manner that in Judge Reinhardt's words is "grossly over- and under-inclusive ..." *Latta*, 771 F.3d at 472; *Bostic*, 760 F.3d at 381-82; *Baskin v. Bogan*, 766 F.3d 648, 661, 672 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Kitchen*, 755 F.3d at 1219-21. But from a social-science perspective, that argument—and Judge Posner's similar one—is wrong for multiple reasons.

First, it again ignores the real issue, which is the impact of redefining marriage on the *institution* itself, and hence on all of the norms it reinforces. A state can easily allow infertile man-woman couples to marry (and avoid invading privacy) without changing the man-woman definition and thus losing the benefits of the attendant social norms. Indeed, allowing such marriages *reinforces* rather than undermines the norms of marriage for other man-woman couples who can reproduce accidentally. Girgis:73-77; Somerville(b):63-78. Allowing infertile man-woman couples to marry is thus fully consistent with the institutional norms of marriage, even if those couples are the rare exception to the biological reality that man-woman couples naturally procreate.[11]

Conversely, taking *other* measures to further the state interests underlying the man-woman definition—such as Judge Reinhardt's suggestion to "rescind the right of no-fault divorce, or to divorce altogether"—would not materially reduce the adverse impact of removing the man-woman definition. *Latta*, 771 F.3d at 472. Nor would it materially reduce

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[11] Only 1.7% of U.S. women are non-surgically sterile. NHSR(b):13. Science has documented that male fertility extends late into life. Kuhnert:329.

the resulting harms and risks to the state's children and the state itself. Because many of the norms and social benefits associated with marriage flow from the man-woman definition, removing it will have adverse consequences no matter what *else* a state might do to strengthen marriage.

Second, the underinclusiveness argument ignores that, if it is to be effective in its objective of channeling procreation into stable adult relationships, marriage is underinclusive by necessity. The only way to *prove* fertility would be to conceive. But that would undermine marriage's purpose of channeling procreation into marriage.

Third, "channeling" is just one of marriage's purposes. The analyses by Judges Reinhardt, Lucero and Posner ignore its other social norms—including the value of biological connections and gender diversity in parenting. When those additional purposes are considered, it becomes clear that the man-woman definition is neither over- nor under-inclusive compared to the *collection* of state interests it serves.

Finally, the "lack of fit" argument ignores that the state's choice is binary: It can *either* preserve the benefits of the man-woman definition *or* it can remove it—replacing it with an "any two qualified persons" definition—and risk losing those benefits. It cannot do both. Thus, a state's choice to preserve the man-woman definition is narrowly tailored to the state's interests in preserving those benefits and in avoiding the enormous societal risks accompanying a genderless-marriage regime.

In short, the risks outlined above—to the institution of marriage and consequently to a state's children and the state itself—amply justify a decision to retain the man-woman definition. And they do so independently of any particular views on theology, natural law or sexual morality.

2. What does this imply for states that have adopted genderless marriage through democratic means, or who might do so in the future? As this Court held in *Windsor*, they have a right to do that, free from interference or second-guessing by the federal government.

But states that make that choice are subjecting their children—and hence themselves—to enormous long-term risks. Those include risks of increased fatherlessness, reduced parental financial support, reduced performance in school, increased crime, substance abuse and abortions, and greater psychological problems—with the attendant costs to the state and its citizens. *Supra* note 4.

However, a state that makes that choice on its own—as a "laboratory" of democracy—can always change its mind. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And if such a state later reintroduces the man-woman definition—even if it "grandfathers" existing same-sex marriages—over time it can likely recapture the social norms that depend on that definition, and thereby recapture the associated social benefits.

By contrast, a state ordered by a federal constitutional ruling to abandon the man-woman definition cannot simply re-enact it once the perils of the gen-

derless marriage regime become more apparent. Like a public figure falsely accused of wrongdoing, such a state might well ask, "Where do I go to get my marriage institution back?" A constitutional right to same-sex marriage—with the consequent command that a state redefine its understanding of marriage—cuts off the process of voluntary experimentation that is essential for assessing the long-term effects of major institutional changes that, like no-fault divorce, can have profound and even catastrophic unintended consequences. When a court constitutionalizes such institutional change, a state—and its people—have no practical way to reverse those consequences once they become apparent.

The impact of such a ruling on marriage would be even more severe than the impact of *Roe v. Wade* on the abortion debate. 410 U.S. 113 (1973). Even under that decision, states still had leeway to be more "pro-life" in the second and third trimesters. By contrast, a decision mandating same-sex marriage logically requires that marriage be redefined in genderless terms—for everyone. There is no middle ground.

3. As a theoretical matter, moreover, there is no principled ground for distinguishing other marital innovations from same-sex marriage. For example, if a lesbian woman has a constitutionally protected right to marry the one woman she loves, why wouldn't a bisexual woman have a similar right to marry the one woman *and* the one man she loves? And why can't each of them have a similar right to marry her – the one other adult each of them loves? After all, if the gender complementarity pillar of man-woman marriage invidiously discriminates against homosexuals, why isn't the monogamy pillar

of man-woman marriage similarly invalid against bisexuals?

Social science offers no sound theoretical basis for distinguishing between those situations. And absent some grounding in social science, courts will have difficulty drawing a principled distinction between them. Moreover, given that a large percentage of parents who identify as lesbian or gay are in fact bisexual (see Miller:Tables 1&2), courts across the Nation will undoubtedly be forced to address this situation if this Court establishes a right to same-sex marriage.

Fortunately, the question presented in this case is one on which social science, tradition, and common sense converge: They all establish that the man-woman understanding and definition of marriage bring immense benefits to individuals and societies.

To be sure, some may take a different view of the proper *balance* of benefits—though neither petitioners nor their *amici* have attempted to address the social costs and risks of redefining marriage to the children of heterosexuals. But if the Court were "to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one." *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 845 (2007) (Breyer, J., dissenting) (emphasis added). That is all the more reason to exercise the "judicial humility" urged by Justice Alito, and to refrain from second-guessing the people's considered judgment on the existentially crucial issue of how best to define marriage.

CONCLUSION

What marriage reformers like Judge Reinhardt, Judge Posner, petitioners and their *amici* don't understand is that a social institution is like an ecosystem—substantial changes to it can have consequences that are unintended and slow-moving, but still devastating. Thus G.K. Chesterton's famous warning applies here. "Nobody," he said, "has any business" to destroy or substantially modify "a social institution until he has really seen it as an historical institution":

> If he knows how it arose, and what purposes it was supposed to serve, he may really be able to say that they ... are purposes which are no longer served. But if he simply stares at the thing as a senseless monstrosity that has somehow sprung up in his path, it is he and not the traditionalist who is suffering from an illusion.

Chesterton:173-74. The evidence outlined here—still undisputed by petitioners and their *amici*—confirms that the man-woman definition of marriage is not a "senseless monstrosity." To the contrary, it powerfully advances compelling, secular state interests—especially the aggregate welfare of the state's children. And it is on them that the forced abolition of that definition would inflict enormous, irreparable harm.

The decision below should be affirmed.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

APPENDIX

APPENDIX A: List of *Amici*[1]

Aguirre, Dr. Maria S., Professor of Economics, The Catholic University of America

Allen, Dr. Douglas W., Professor of Economics, Simon Fraser University

Alvare, Helen M., Professor of Law, George Mason University

Araujo, Dr. Robert John, University Professor Emeritus, Loyola University Chicago

Baptist, Dr. Errol C., Clinical Professor of Pediatrics, University of Illinois

Bateman, Dr. Michael, Assistant Professor of Pediatrics, University of Minnesota

Bauman, Dr. Michael E., Professor of Theology and Culture, Hillsdale College

Benton, Dr. Thomas B.B., Adjunct Faculty in Pediatrics, University of Florida College of Medicine

Bleich, Dr. J. David, Professor of Jewish Law and Ethics, Cardozo Law School, Yeshiva University

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[1] Institutions listed for identification purposes only. Opinions expressed are those of the individual *amici*, and not necessarily of their affiliated institutions.

Boone, Dr. Mark J., Assistant Professor of Philosophy, Forman Christian College

Bouvier, Dr. Joseph, Clinical Assistant Professor of Child Health (Pediatrics) and Emergency Medicine, University of Arizona College of Medicine

Bradford, Dr. Kay, Associate Professor of Family, Consumer & Human Development, Utah State University

Bradford, Dr. Nathan F., Associate Professor of Family Medicine, AnMed Health Oglesby Center

Brakman, Dr. Sarah-Vaughan, Associate Professor of Philsophy, Villanova University

Busby, Dr. Dean, Professor of Family Life, Brigham Young University

Carlson, Jr., Dr. Alfred J., Associate Faculty in Pediatrics, University of Pennsylvania Medical School

Cavadini, Dr. John, Professor of Theology, University of Notre Dame

Christensen, Dr. Bryce, Associate Professor of English, Southern Utah University

Colosi, Dr. Peter J., Associate Professor of Moral Theology, Charles Borromeo Seminary

Corral, Dr. Hernan, Professor of Private Law, University of the Andes (Santiago, Chile)

Crosby, Dr. John F., Professor of Philosophy, Franciscan University of Steubenville

De Jesus, Ligia M., Associate Professor of Law, Ave Maria School of Law

Deneen, Dr. Patrick J., Associate Professor of Political Science, University of Notre Dame

Dennis, Dr. Steven A., Professor of Human Development, Brigham Young University-Idaho

DeWolf, David K., Professor of Law, Gonzaga University

Duncan, Dwight, Professor of Law, University of Massachusetts

Esolen, Dr. Anthony M., Professor of English, Providence College

Farnsworth, Dr. Richard Y., Adjunct Associate Professor of Pediatrics, University of Utah School of Medicine

Field, Dr. Scott, Adjunct Faculty in Pediatrics, University of Alabama-Huntsville

Fields, Dr. Stephen M., Associate Professor of Theology, Georgetown University

Fitzgibbons, Dr. Richard, Director, Institute for Marital Healing

Foley, Dr. Michael P., Associate Professor of Patristics, Baylor University

Gombosi, Dr. Russell, Adjunct Professor of Pediatrics, Commonwealth Medical University (Scranton, PA)

Grabowski, Dr. John, Associate Professor of Moral Theology & Ethics, The Catholic University of America

Hafen, Bruce C., Emeritus Dean and Professor of Law, Brigham Young University

Hancock, Dr. Ralph, Professor of Political Science, Brigham Young University

Hartle, Dr. Ann, Professor of Philosophy, Emory University

Hawkins, Dr. Alan J., Professor of Family Life, Brigham Young University

Healy, Dr. Nicholas J., Assistant Professor of Philosophy, Pontifical John Paul II Institute on Marriage and Family at The Catholic University of America

Hendershott, Dr. Anne, Professor of Psychology, Sociology & Social Work, Franciscan University of Steubenville

Henry, Dr. Douglas, Associate Professor of Philosophy, Baylor University

Hill, Dr. E. Jeffrey, Professor of Family Life, Brigham Young University

Hoffman, Dr. Robert P., Professor of Pediatrics, The Ohio State University

Holland, Dr. Matthew S., University President and Professor of Political Science, Utah Valley University

Jacob, Bradley P., Associate Professor of Law, Regent University

Jacobs, Dr. Nathan A., Visiting Lecturer in Philosophy, University of Kentucky

James, Dr. Spencer, Assistant Professor of Family Life, Brigham Young University

Jeynes, Dr. William, Professor of Education, California State University at Long Beach

Johnson, Dr. Byron R., Distinguished Professor of the Social Sciences, Baylor University

Jones, Dr. Woodson S., Adjunct Professor of Pediatrics, University of Texas Health Science Center

Kaleida, Dr. Phillips H., Formerly Professor of Pediatrics (Retired 2014), University of Pittsburgh

Kampowski, Dr. Stephan, Professor of Philosophical Anthropology, Pontifical John Paul II Institute on Marriage and Family at The Catholic University of America

Keen, Dr. Mary, Clinical Associate Professor, Loyola University Medical School

Keys, Dr. Mary M., Associate Professor of Political Science, University of Notre Dame

Knapp, Dr. Stan J., Associate Professor of Sociology, Brigham Young University

Koterski, Dr. Joseph W., Associate Professor of Philosophy, Fordham University

Krason, Dr. Stephen, Professor of Political Science and Legal Studies, Franciscan University of Steubenville

Kries, Dr. Douglas, Professor of Philosophy, Gonzaga University

Lacy, Dr. Mark D., Associate Professor of Medicine, Texas Tech University

Lafferriere, Dr. Jorge Nicolas, Professor of Civil Law, Pontificia Universidad Catolica Argentina

Laughlin, Gregory K., Associate Professor of Law, Cumberland School of Law, Samford University

Lindevaldsen, Rena M., Professor of Family Law, Liberty University School of Law

Lim, Dr. Paul, Adjunct Professor of Surgery, University of Minnesota Medical School (Duluth)

Liu, Dr. Paul, Clinical Assistant Professor of Pediatrics, University of Arizona

Mansfield, Dr. Richard, Clinical Associate Professor of Pediatrics, Georgia Health Science University; Assistant Professor of Pediatrics, Virginia College of Osteopathic Medicine

Marcin, Raymond B., Emeritus Professor of Law, The Catholic University of America

Martins, Joseph J., Assistant Professor of Law, Liberty University School of Law

Matthews, Dr. Randolph, Clinical Assistant Professor of Pediatrics, Wake Forest School of Medicine

McCarthy, Dr. Margaret, Assistant Professor of Theological Anthropology, Pontifical John Paul II Institute at The Catholic University of America

McGehee, Dr. Frank T., Clinical Instructor in Pediatrics, University of Texas-Arlington

Mikochik, Stephen, Visiting Professor, Ave Maria School of Law; Professor Emeritus, Temple University School of Law

Miller, Dr. Jerry A., Clinical Professor of Pediatrics, Medical College of Georgia

Morton, Dr. Charles, Clinical Professor of Pediatrics, University of Illinois College of Medicine at Urbana-Champaign

Nathanson, Dr. Paul, Religious Studies Faculty (retired), McGill University

Nowicki, Dr. Michael J., Professor of Pediatrics, University of Mississippi School of Medicine

Olson, Dr. Ross, Assistant Professor of Pediatrics (retired), University of Minnesota

Pearson, Dr. James M., Assistant Clinical Professor, East Tennessee State University College of Medicine

Pearson, Dr. Lewis, Assistant Professor of Philosophy, University of St. Francis

Pecknold, Dr. C. C., Associate Professor of Theology, The Catholic University of America

Peterson, Dr. James C., Professor of Ethics, Roanoke College

Prudlo, Dr. Donald S., Associate Professor of Ancient & Medieval History, Jacksonville State University

Pruss, Dr. Alexander, Professor of Philosophy, Baylor University

Rane, Dr. Tom, Professor of Child Development, Brigham Young University-Idaho

Schlueter, Dr. Nathan, Associate Professor of Philosophy, Hillsdale College

Schramm, Dr. David, Associate Professor of Human Development & Family Studies, University of Missouri

Shaw, Dr. Bill, Assistant Professor of Pediatrics, Virginia Commonwealth University

Shelton, Dr. Jean, Associate Professor of Pediatrics, East Virginia Medical School

Sherlock, Dr. Richard, Professor of Philosophy, Utah State University

Silliman, Dr. Ben, Professor of Youth Development, North Carolina State University

Smith, Dr. Christine Z., Assistant Professor of Pediatrics, Texas Tech Paul Foster School of Medicine

Smolin, David M., Professor of Law, Cumberland Law School, Samford University

Sodergren, Dr. Andrew, Adjunct Assistant Professor of Psychology, Pontifical John Paul II Institute at The Catholic University of America

Somerville, Dr. Margaret, Professor of Law, Professor Faculty of Medicine, McGill University

Storm, Dr. Joanna, Professor of Psychology, Franciscan University of Steubenville

Tollefsen, Dr. Christopher, Professor of Philosophy, University of South Carolina

Vitz, Dr. Paul C., Senior Scholar and Professor of Psychology, The Institute for Psychological Sciences; formerly Professor of Psychology, New York University

Vizcarrondo, Dr. Felipe E., Associate Professor, University of Miami Miller School of Medicine

Walls, Dr. Jerry, Professor of Philosophy, Houston Baptist University

Wheless, Dr. James W., Professor and Chief of Pediatric Neurology, University of Tennessee

Williams, Dr. Richard N., Professor of Psychology, Brigham Young University

Wilson, Jr., Dr. Robert, Clerkship Co-Director of Pediatrics, Florida State University College of Medicine

Yates, Dr. Ferdinand D., Professor of Clinical Pediatrics, State University of New York at Buffalo

Yenor, Dr. Scott, Professor of Political Science, Boise State University

Young, Dr. Katherine K., Professor Emeritus of Religious Studies, McGill University

Zanga, Dr. Joseph, Professor of Pediatrics, Mercer University School of Medicine; Clinical Profes-

sor of Pediatrics, Medical College of Georgia & Philadelphia College of Osteopathic Medicine

Zaso, Dr. John, Clinical Assistant Professor of Pediatrics, Hofstra NS-LIJ School of Medicine

APPENDIX B: Technical Analysis of Statistics on Marriage, Non-Marital Births and Divorce

This appendix presents a technical analysis of issues related to rates of marriage, non-marital births and divorce in states and nations that have adopted same-sex marriage. In so doing it evaluates several related statements in the Brief of *Amici Curiae* Massachusetts et al. ("Amicus Br.").

Marriage Rates

Statement #1: "In contrast to a pre-existing national downward trend, overall marriage rates in States that permit same-sex couples to wed have improved. Marriage rates immediately increased in all seven States for which data are available (Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont)." Amicus Br. 22.

While both sentences are technically true, the statement is misleading because the same-sex marriage (SSM) states now count same-sex marriages in their marriage totals, boosting their overall numbers. When only opposite-sex marriages are counted—in the four states that kept such data for a time—a very different picture emerges:

Opposite-Sex Marriage Rates per 1,000[2]	Year Before SSM	SSM Year 1	Y2	Y3	Y4	Y5	Y6
VT	7.9	7.5	ND	ND	ND	ND	ND
IA	6.5	6.1	6.1	6.0	6.2	5.9	ND
CT	5.5	5.2	5.1	ND	ND	ND	ND
MA[3]	5.6	5.5	5.8	5.7	5.6	5.3	5.1

Note: ND = no data

Thus, as of the last year of available data for opposite-sex marriage rates in the states that kept such data, no state that had adopted SSM had opposite-sex marriage rates equal to or higher than the pre-SSM level. And the overall trend in all four states has been a significant decline in measured opposite-sex marriage rates. The following chart, consisting of the data from the above table, makes that clear:

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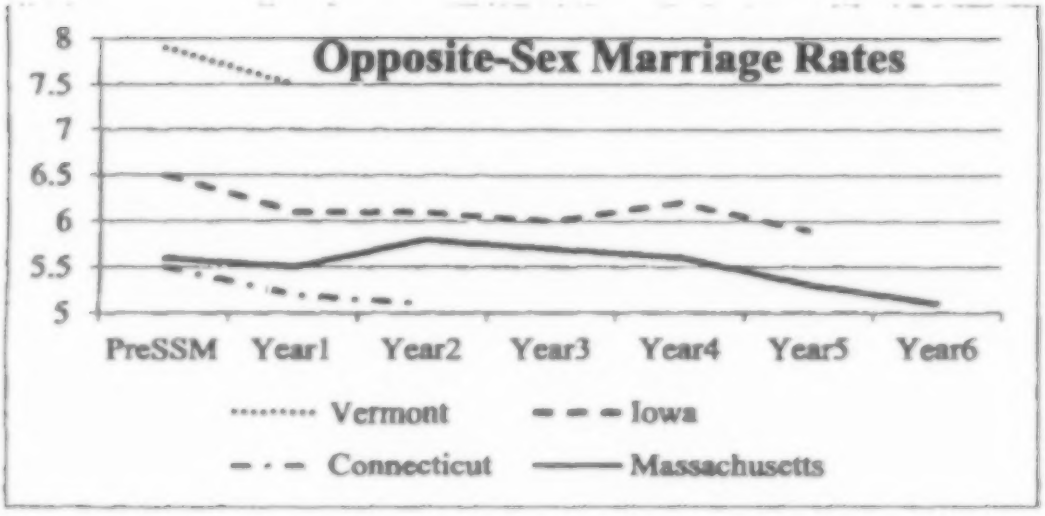
[2] Data for Iowa and Massachusetts were obtained from those states; data for the other states were obtained from Alexis Dinno & Chelsea Whitney, *Same Sex Marriage and the Perceived Assualt on Opposite Sex Marriage*, 8 PLOS One (June 2013) (available at http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0065730). That study itself has serious methodological flaws, including only a few years of same-sex marriage (compared to same-sex civil unions), which reduces the statistical ability to find differences, as well as a complete lack of control variables for any state.

[3] We have obtained four additional years of data from Massachusetts, and the marriage rates are Y7 (5.2), Y8 (5.2), Y9 (5.3) and Y10 (5.1) – the same rate as Y6.



In fact, the opposite-sex marriage rate for each of these four SSM states is the lowest recorded in each state's history.

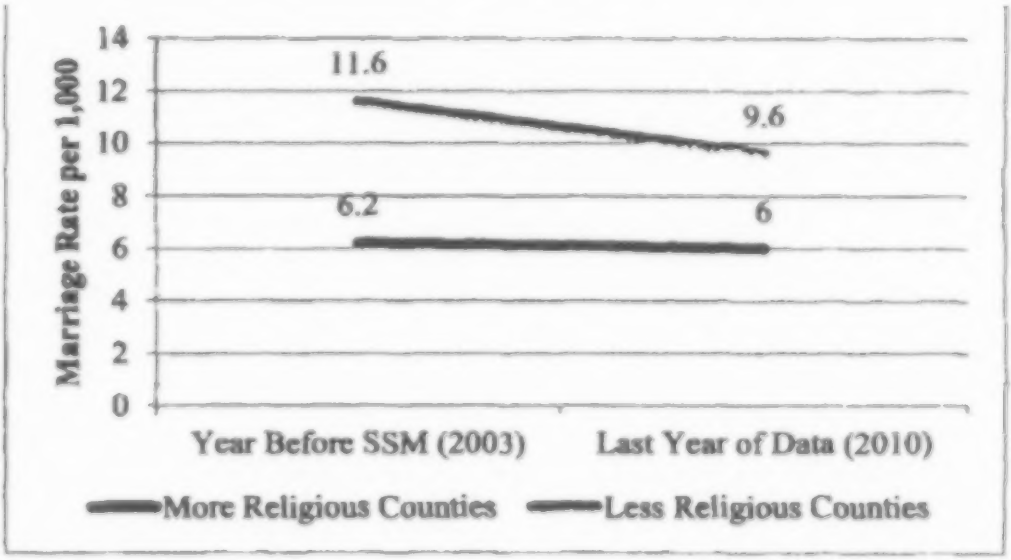
Statement #2: "Nor have marriage equality States seen a dramatic decrease in the rate at which different-sex couples in particular marry. In some, the number of different-sex marriages increased in the years following the State's recognition of same-sex marriages." *Id.* at 23.

This statement is almost entirely false. As noted above, all four SSM states with data on opposite-sex marriages through 2009 have experienced marked declines in the rate of opposite-sex marriages. Three of the states have never seen opposite-sex marriages rise to their pre-same-sex marriage level. One state (Massachusetts) saw an initial decline, then a fleeting increase, but then a further decline below pre-SSM levels.

Over the entire period, Vermont experienced a 5.1% drop, Iowa a 9.2% decline, Connecticut a 7.3% decrease, and Massachusetts an 8.9% reduction in

their respective opposite-sex marriage rates in the last year for which data are available, compared to the year just prior to adopting same-sex marriage. However, from 2009 (the first year of genderless marriage in Iowa and Vermont, and the second in Connecticut) until 2012, the marriage rate in the United States remained stable.[4]

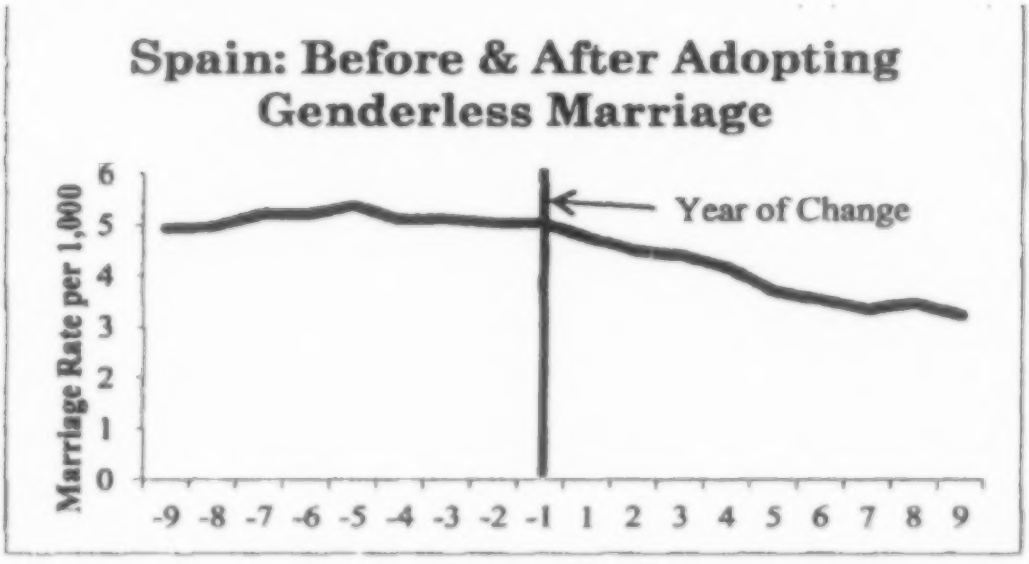
Furthermore, similar to the findings out of the Netherlands where the country's Bible Belt and less religious areas experienced different effects from adopting same-sex marriage, with the less religious areas suffering significant declines in marriage rates, a similar pattern is unfolding in Massachusetts. There the more religious counties saw their marriage rate drop from 6.2 to 6.0 (a 3.3% decline), whereas the less religious counties saw their marriage rate reduce from 11.6 to 9.6 (a 16.8% decline).[5]



[4] CDC(b). While the national data will include same-sex marriages, their numbers are so low that they would make very little impact on the overall country-level rate.

[5] Data were obtained from the state of Massachusetts.

Other western nations that have adopted same-sex marriage have also seen subsequent declines in their marriage rates. Perhaps the most notable is Spain, which in the nine-year period before adopting same-sex marriage saw marriage rates increase, and in the nine years after has seen opposite-sex marriage rates plummet by 36%.[6]



Belgium[7] and Canada[8] have seen more modest declines of (respectively) 7.7% and 4.3% (6.8% if you count from when the first provinces adopted same-sex marriage). However, Canada and Belgium's rates reflect *all* marriages, so they underrepresent the decline of opposite-sex marriage rates.

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[6] Data on Spanish marriages from Instituto Nacional de Estadistica, and on Spanish population from the World Bank. Data available through 2013.

[7] Data from Eurostat and NationMaster. Data available through 2012.

[8] Anne Milan, *Marital Status: Overview, 2011* at 8, Component of Statistics Canada Catalogue no. 91-209-X (July 2013), available at http://www.statcan.gc.ca/pub/91-209-x/2013001/article/11788-eng.pdf. Data available through 2008.

In addition, the Netherlands study discussed above, using more sophisticated statistical analysis than that presented above for the relevant U.S. states and foreign nations, found that the nationwide decline in marriage rates for Netherlands women aged 18-22 went from 2.8% to 7.8% per year in the period after redefining marriage in genderless terms—for a net decline in the marriage rate (after adjusting for the pre-existing trend) of 5%. When the population was further subdivided, the net decline in the marriage rate was even larger among some populations: a decline of 31.8 percent for young women in the four largest urban areas, and 13.4% for all native Netherlands young women.[9]

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[9] Mircea Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands*, 51 Demography 317, 333-37 Table 3, Table 4, Table 5 (2014).

Trandafir's more recent study (Trandafir(c)) also examines data on Belgium and Canada—whose data are less useful because they don't separate opposite-sex and same-sex marriages—but omits Spain on the ground that it liberalized *divorce* at the same time it adopted same-sex marriage. But this is merely further evidence that the institution of man-woman marriage can be significantly altered—and weakened—by legal changes. By making both changes simultaneously, Spain wrought a double whammy on marriage, likely creating an interaction effect between the two changes. Since no country or state has seen such a rapid decline in the man-woman marriage rate in the wake of adopting more liberalized divorce laws, it is impossible to attribute all or even most of the change to that. Genderless marriage, and its interaction with easier divorce, appears to be doing most of the work.

Further, Trandafir's more recent study ignores in-country heterogeneous effects discussed in his earlier study, based on the unsupported assertion that since countries are different, heterogeneous effects should show up at the country level. With his analysis so limited, he finds no effect from the adoption of

Nonmarital Births

Statement #1: "Massachusetts's nonmarital birth rate has been well below the national average for years, including after same-sex couples began to marry. In 2013, 12 of the 17 marriage equality States had lower percentages of births to unmarried mothers than the nationwide rate." Amicus Br. at 23-24.

The reason the percentage of nonmarital births is low in Massachusetts, and in many of these other SSM states, is that their abortion rates are so high—higher than the national average, whether measured in number of abortions per 1,000 women aged 15-44, or number of abortions per 1,000 live births. This is shown in the following chart:

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same-sex marriage, but would also have found no effect in his Netherlands study if he had not looked at differences across gender, religiosity, and ethnicity. Finally, Trandafir's graphs in his Figure A (121) show that in countries that have adopted same-sex marriage, for the three years prior to the adoption the marriage rates had leveled out, but upon adoption declined. The other OECD nations examined in this study did not redefine marriage soon enough for Trandafir to attempt to examine the effects of that change, and his analysis of other legal developments (like civil unions) in those countries is irrelevant to the analysis here.

Abortion Rates, Ratios & Rankings	Per 1,000 women[10]	Nat'l Ranking	Per 1,000 live births[11]	Nat'l Ranking[12]
U.S.	18.9	n/a	219	n/a
Non-SSM State Avg.	12.9	n/a	168	n/a
SSM State Avg.	[illegible]	[illegible]	[illegible]	n/a
MA	17.8	12	283	7
DC	28.5	3	298	6
NY	34.2	1	461	1
IA	9.7	[illegible]	126	34
CT	21.3	8	338	4
VT	11.7	32	223	14
NH	12.9	26	ND	ND

As the chart shows, most of the SSM states have higher abortion rates and ratios than the U.S. average—with four of the SSM states ranking in the top 10.[13] Thus, in 2011, SSM states averaged 50.4% more abortions per 1,000 women, and 71.4% more abortions per 1,000 births.[14]

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[10] Guttmacher Institute(b), *State Facts About Abortion*, available at http://www.guttmacher.org/statecenter/sfaa.html

[11] CDC(d), Abortion Surveillance—United States, 2011 (Nov. 28, 2014), available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6311a1.htm?s_cid=ss6311a1_w.

[12] New Hampshire, California, Maryland and Wyoming did not submit data for abortion ratios per 1,000 live births.

[13] While *amici* point to 17 states with same-sex marriage in 2013, the latest abortion data is only available from 2011, when only 7 states had same-sex marriage.

[14] 19.4/12.9; 288/168.

Combining these data with the above data showing a decline in opposite-sex marriages rates in the wake of a state's adopting same-sex marriage, we can reasonably conclude that a nationwide rule mandating recognition of such marriages would likely be followed in each state by some combination of increased abortions and increased nonmarital births. And the precise combination would depend on whether the state's population tends to be more pro- or anti-abortion.[15] The logic is simple and intuitive: Fewer opposite-sex marriages means more unmarried women, which in turn means fewer children born, more children born to unmarried mothers, and more children aborted. See also Scholars of Fertility Brief.

Analysis of readily available data also permits us to predict the likely magnitude of these effects. We know, for example, that in 2012 there were 2.131 million marriages in the U.S[16]--with approximately 80% of those (1.7 million) being to those in their childbearing years, i.e., ages 15-44. We also know that, at 5 to 9 percent, the raw decline thus far in opposite-sex marriage rates in the U.S. states that have adopted same-sex marriage are in line with (and probably lower than) the long-term decline predicted by the Netherlands study, which examined the impact of a redefinition over a longer period, as well as the analysis of Spain, Belgium and Canada discussed above.

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[15] Of course, correlation is not causation. But the Netherlands' data and its analysis is sufficiently sophisticated that causality can be derived, and the Netherlands' findings are consistent with the descriptive state data.

[16] CDC(c), *National Marriage and Divorce Rate Trends*, available at http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm

(Recall that the decline in Canada's marriage rate was 4.3 percent, *including* same-sex marriages.)

Conservatively applying the lowest of these state reductions, a 5% reduction in marriages among U.S. residents aged 15-44 (from a base of 1.7 million) means 85,000 fewer marriages per year. Over a 30-year fertility cycle, that amounts to 2.55 million fewer marriages. To be sure, some of those women will simply delay marriage,[17] while others will never marry. Historically, about half of those not married during the age cohort of 25-34 will not marry before 55, and somewhat more than half will not marry by 45, the end of the fertility cycle for census purposes.[18]

Accordingly, conservatively assuming that half of the decline in marriages over the next generation would come from women who permanently never marry as opposed to delaying marriage, this would mean that 2.5% more women aged 15-44 will never marry.[19] That in turn implies that over a 30-year cycle, a total of 1.275 million additional women would

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[17] Of course, this increases the number of children born while out of wedlock, and reduces the number of children who will be born overall, due to fewer pregnancies from contraception, or fewer births due to abortion. The calculations reported below conservatively ignore this effect of a declining marriage rate.

[18] Pew Research Center, *Record Share of Americans Have Never Married* (September 24, 2014), available at http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/

[19] Kennedy & Ruggles observe: "With the rise of cohabitation, it is likely that many couples who would have been at the highest risk of divorce in the past—for example, those entering unions as teenagers as a result of an unplanned pregnancy, or with low levels of income and education—are forgoing marriage entirely." *Id.* at 596.

never marry—the equivalent of the entire city of Dallas, TX.[20]

What effect will this increased number of never-married women have on children? To answer that question we must first examine statistics on total lifetime fertility. The average number of children born to a woman *ever* married during her childbearing years (15-44) is 1.84.[21] By contrast, a woman never married during those years averages 0.46 children. Multiplying the latter number by the 1.275 million unmarried women who would have been married but for nationwide same-sex marriage leads to the conclusion that, over a 30-year fertility cycle, we would expect to see 586,500 children born to unmarried mothers—nearly the population of Washington, D.C.[22]

This is a very conservative prediction. As noted, it assumes that the reduction in the marriage rate is at the very low end of actual experience in both the U.S. and the Netherlands. It also assumes that the experience in those jurisdictions over a small number of years (a year or two in some cases) fully captures the *total*, steady-state impact of a marriage redefinition

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[20] U.S. Census Bureau, Table 27: Incorporated Placed with 175,000 or More Inhabitants in 2010, available at https://www.census.gov/compendia/statab/2012/tables/12s0027.pdf.

[21] U.S. Census Bureau, Current Population Survey, Table 3: Children Ever Born per 1,000 Women and Percent Childless by Age and Marital Status (June 2012), available at http://www.census.gov/hhes/fertility/data/cps/2012.html.

[22] U.S. Census Bureau, Table 27: Incorporated Placed with 175,000 or More Inhabitants in 2010, available at https://www.census.gov/compendia/statab/2012/tables/12s0027.pdf.

on opposite-sex marriage rates. It also ignores the impact of increasing the number of women who marry but do so later in life—thus resulting in more nonmarital childbirths as they delay marriage during their peak childbearing years. And it assumes that, on average, the additional women who never marry behave more like single non-cohabiting women than single cohabiting women—who have substantially higher birthrates than the average for all single women.[23]

Under the conservative assumptions and analysis outlined above, it is also fair to attribute this nearly 600,000 increase in nonmarital births to a hypothetical nationwide rule requiring same-sex marriage, compared to a regime in which states are free to decide—and in fact do decide—to preserve the traditional man-woman definition of marriage.[24] And

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[23] Cohabitating women have a birth rate nearly 8 times that of non-cohabitating single women. That number is derived as follows: Currently 58% of children born to unmarried mothers are from women who are cohabitating, Curtin et al.(b), *Recent Declines in Nonmarital Childbearing in the United States*, NCHS Data Brief No. 162 (August 2014), available http://www.cdc.gov/nchs/data/databriefs/db162.pdf at 4, whereas single women who have never married are about five times greater in number in the total population of women (cohabitating, not married = 8.4%, never-married, not cohabitating = 39.7%, and previously married, not cohabitating = 8.2%). Guttmacher Institute(a), *Characteristics of U.S. Abortion Patients*, 2008, available at http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf, at 6. Cohabitating women are 15% of the unmarried women population and have 58% of the babies, and single women are 85% of the population and have 42% of the babies. The calculation is (58/15)/(42/85) = 7.9.

[24] Granted, 17 states already have same-sex marriage through their own initiative, and would likely continue to do so if the Court upholds man-woman marriage laws. We would expect to

shortly after the Netherlands adopted genderless marriage, out-of-wedlock births saw their biggest increase in 40 years.[25]

In addition, given the difference between lifetime fertility rates of married versus never-married women (1.84 versus 0.46), the above analysis implies that there will be as many as 1.75 million children who *would* have been born, but will not.[26] This number is larger than the population of Philadelphia.[27] Some of

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see a continued adverse impact in those states even if the rest of the country does not follow, and so the differences we project could be somewhat overstated in that sense. However, we do not see this as a problem for two reasons. First, because these states would be a minority, and a majority of the states would still be under man-woman laws, the impact of same-sex marriage on opposite-sex marriage rates in these minority states would be somewhat diluted. Second, we have consistently sought to use conservative estimates, and these likely compensate for any effect of some states having already chosen same-sex marriage on their own.

[25] Jennings:75.

[26] The math is as follows: 1.275 million x (1.84-0.46) = 1,759,500. But here, multiplying 1.275 million unmarried women by the difference in lifetime fertility rates between married and unmarried women biases the prediction upward, since the future group of unmarried women will likely have a higher proportion of women cohabitating (compared to being single and not cohabitating) than now, and those women have higher birthrates. However, the other conservative assumptions discussed above—such as assuming a low reduction in overall marriage rates and ignoring the impact of delaying but not eliminating marriage—may offset this bias. In any event, the number of children who would have been but will never be born under a nationwide same-sex marriage regime is likely to be large.

[27] U.S. Census Bureau, Table 27: Incorporated Placed with 175,000 or More Inhabitants in 2010, available at https://www.census.gov/compendia/statab/2012/tables/12s0027.pdf.

this reduction in the overall number of births will be due to contraception. But some will be children who are aborted before birth.

How many? Currently, there are 28.9 abortions per 1,000 unmarried women per year (in contrast to a rate of 6.1 for married women).[28] One can calculate the total number of abortions over an unmarried woman's childbearing years by averaging this rate over her assumed 30-year fertility period. Thus, unmarried women average .87 abortions during their lifetime.[29] So, with 1.275 million women never getting married, nearly 900,000 children of the next generation will be aborted—children that would have been born if their mothers had married.[30] This is similar in magnitude to the entire cities of Sacramento and Atlanta combined being aborted over the next generation.[31] And again, this is a conservative prediction of a value that is likely significantly higher.[32]

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[28] Sally C. Curtin et al.(a), *Pregnancy Rates for U.S. Women Continue to Drop*, NCHS Data Brief No. 136, at 5 (December 2013), available at http://www.cdc.gov/nchs/data/databriefs/db136.pdf.

[29] 28.9 abortions per 1,000 unmarried women times 30 years = 867 abortions per 1,000 unmarried women for that period, or .87 abortions per woman.

[30] .87 unmarried women x 1.275 million unmarried women = 1,109,250 abortions. 6.1 abortions per 1,000 married women annually is .18 abortions per married woman (6.1 x 30 / 1000). 1.275 million unmarried women x .18 abortions = 229,500. 1,109,250 – 229,500 = 879,750.

[31] U.S. Census Bureau, Table 27: Incorporated Placed with 175,000 or More Inhabitants in 2010, available at https://www.census.gov/compendia/statab/2012/tables/12s0027.pdf

[32] It doesn't count abortions from women who choose to delay marriage during their prime childbearing years. Also, the abor-

Divorce Rates

Statement #1: "Marriage equality States have not experienced increased rates of divorce." Amicus Br. 23.

This is false. The divorce rates in states that have adopted same-sex marriage increased from the year before—the opposite of the national trend—in three of the SSM states, and were higher in 2011 than before adopting SSM in three of the states:

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tion index—a sub-group's relative abortion rate calculated by determining the group's proportion of total abortions compared to the group's proportion of the total population—is more than three times higher for cohabitating women (3.46) compared to the typical woman. Guttmacher Institute(a), at 5. Non-cohabitating single women are only slightly above average (1.13), and married women (0.34) are well below the likelihood of abortion for the typical woman. Hence, since a greater proportion of the estimated 1.275 million additional unmarried women over the next 30 years will likely cohabitate, the actual number of abortions is likely to be substantially higher.

State Divorce Rate Per 1,000[33]	Year Prior To SSM	2010	2011
MA	**2.5**	**2.5**	**2.7**
CT	3.4	2.9	3.1
IA	**2.6**	**2.4**	**2.4**
VT	3.6	3.8	3.6
NH	**3.7**	**3.8**	**3.8**
DC	2.7	2.8	2.9
NY	**2.9**	**2.9**	**2.9**

In fact, Massachusetts—the state with the longest experience with same-sex marriage—has since 2008 (4 years after adopting genderless marriage) seen a large increase in divorces, the largest of any state in the country. This is true whether the increase is measured in raw ratios—an increase of 0.7 per 1,000 (2.7 in 2011 versus 2.0 in 2008)—or percentages—an increase of 35% in just three years. That this skyrocketing divorce rate did not start until a few years into the adoption of genderless marriage is not surprising, since changes in divorce rates will lag even further behind changes in marriage rates when there is an exogenous shock to the institution of marriage, such as a redefinition.

Statement #2: "Six of the seven jurisdictions that permitted same-sex couples to marry as of 2011 had a divorce rate that was at or below the national average. Four of the ten States with the lowest divorce rates in the country were marriage equality States." *Id.* at 23.

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[33] CDC(b), Divorce Rates by State, available at http://www.cdc.gov/nchs/data/dvs/state_divorce_rates_90_95_and_ 99-12.pdf. Data for 2012, while available, are still provisional.

It is true that, as of 2011, four of the seven SSM states had divorce rates below the national average. But given that about 80% of marriages last at least five years, and only one of those SSM states had had same-sex marriage five years or longer in 2011,[34] it would not be surprising to see little impact so far in the other states. In other words, more time is needed to assess the impact on divorce rates given the lag between marriage and divorce. Also, given that these are mostly Northeastern states, it's unclear how well their experience will generalize to the rest of the nation.

Additionally, divorce rates are closely related to marriage rates, and the SSM states also had lower marriage rates. States with lower marriage rates appear to experience a "selection effect"—i.e., couples less likely to divorce are more likely to marry, and couples more likely to divorce are more likely cohabit rather than marry. The end result is an unrealistic comparison of one state with stronger marriages but fewer of them, with another state that has (on average) weaker marriages but more of them. Of course the state with more but weaker marriages (on average) will have a higher divorce rate. See Kennedy & Ruggles:596. However, as between the two, for reasons explained in the text, children are more likely to flourish in the latter type of state, as long as it retains a higher percentage of married biological parents.

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[34] National Health Statistics Reports(a), *First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth*, Number 49 (March 22, 2012) (available at http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf#x2013;2010 National Survey of Family Growth [PDF - 419 KB).